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IN THE

Supreme Court of the United States

October Term, 1969

No. 556

SOUTHERN CALIFORNIA EDISON COMPANY,
a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

Supreme Court of the United States

October Term, 1969
No._____

SOUTHERN CALIFORNIA EDISON COMPANY,
a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner (hereinafter called "Edison") prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on April 30, 1969, and modified on denial of rehearing on June 12, 1969.

Citation to Opinions Below

The opinion of the Court of Appeals is printed in Appendix A hereto, *infra*. The modifying statement of the Court of Appeals, in denying a rehearing is printed in Appendix B hereto. The memorandum opinion of the District Court is contained in the Certified Record [Cert. Rec. Vol. 2, Rep. Tr. pp. 1-27]. Both opinions are, (as of this date, August 27, 1969), unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 30, 1969 [Cert. Rec. Vol. 1, unpaged]. Rehearing was denied on June 12, 1969 [Cert. Rec. Vol. 1, unpaged]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 28 U.S.C. § 1345 because this suit was a civil action brought by the United States.

Questions Presented

In summary, the basic question presented to the Court is whether a statute, which grants the public official controlling the national forests the power to grant electrical transmission rights of way only "under general regulations . . . to any citizen, association or corporation of the United States," may be effectuated by regulations which provide for special rules applicable differently to public power companies and municipal power companies, burdening the former and its consumers more heavily than the latter and its consumers.

If, of course, the conduct of the public official in making such regulations is illegal, the regulations and contracts made pursuant thereto are void and no Constitutional question is presented. This, historically, is the preferred approach. We have adverted to the Constitutional question, first, however, realizing that if the answer to the question is that the regulation and the contract are illegal, the Court need not reach the Constitutional question. If it does, the unconstitutionality is manifest.

More specifically and technically, the questions presented are;

1. Whether the Secretary of Agriculture and the Chief of the National Forest Service, may, consistent with the Fifth Amendment of the Constitution of the United States, impose upon Petitioner, a privately owned public utility, by contract, the obligation of responding for forest fire damage under a rule of absolute liability, while, at the same time, otherwise identical contracts require municipally owned public utilities so to respond only when they are proved negligent. The contract in each case is a permit to use portions of the national forest as a right of way for electric power lines.

2. Whether the Secretary of Agriculture and his delegees, who are granted by statute the power to grant such rights of way only "under general regulations . . . to any citizen, association or corporation of the United States" may grant them under special regulations which discriminate between publicly owned electric power companies and privately owned companies, especially when the sole justification for so doing is that, allegedly, officials of publicly owned companies do not have the power, under local laws, to execute the agreement imposed on privately owned power companies, and this without recognition of the existence of the Supreme Law of the Land clause of the Constitution.

3. Whether the Courts below were correct in holding that the contract in question necessarily imposed liability as a matter of law and in holding that such contract was properly so construed against a Constitutional challenge on motion for summary judgment.

Statutes Involved

The statutory provisions involved are:

(a) 31 Stat. 790, the Act of February 15, 1901, c. 372, 16 U.S.C. § 522.

(b) 36 Stat. 1253, the Act of March 4, 1911, c. 238, as amended by 66 Stat. 95, the Act of May 27, 1952, c. 338, 16 U.S.C. § 523. These statutes are printed in Appendix C, *infra.*

Special Statement Regarding Statutes Involved

At all times below, Respondent (herein sometimes called "the Government" and "the United States"), Edison, and the Courts assumed that one of the pertinent statutes was the Act of February 15, 1901, c. 372 (31 Stat. 790, 16 U.S.C. § 522) which contains the grant of power to the Secretary of Agriculture, "under general regulations to permit the use of rights of way for electrical plants, poles and lines." A similar grant of power is conferred on the "head of the department having jurisdiction over the [national forest] under general regulations" in the Act of March 4, 1911, c. 238, as amended (16 U.S.C. § 523). For the first time, in the preparation of this Petition, counsel for Edison determined that it has been said, if not held, that the first of these statutes, 16 U.S.C. § 522, had been repealed by implication at all times relevant to this suit.

> *United States v. Southern Power Company,* (1929) 31 F. 2d 852, 858.

Assuming the correctness of the decision in the *Southern Power* case, *supra,* the governing statute is only 16 U.S.C. § 523 but that statute also contains the pertinent words and Edison's point is the same under each and both statutes.

Statement

The United States sued Edison for $10,865.90, alleged to be the sum spent to suppress a fire on national forest lands and for interest and costs. The action was in two "counts" or causes of action. The first rested on the alleged negligent construction, operation and maintenance of Edison's electric power line which had been installed on a right of way across a portion of the San Bernardino National Forest in California under a contract called a "Special Use Permit." The second cause of action was founded solely upon the alleged fact that the fire was caused by sparks from Edison's power line and made no claim whatever of negligence [Cert. Rec. Vol. 2, Clk. Tr. pp. 2-4].

The Special Use Permit was contractual in form and executed by Edison and an officer of the Forest Service and a full copy thereof is printed as Appendix D, *infra,* [Cert. Rec. Vol. 1, Clk. Tr. pp. 15-20].

After denial of negligence, affirmative pleading of contributory negligence and voluntary assumption of the risk and hazard of the fire, and after discovery, the Government completely dropped its claim of negligence and the parties stipulated: (1) that the Special Use Permit was the sole governing document in the matter, (2) that the claim of the United States was solely based on the Special Use Permit, (3) that the claim was solely that this special permit-contract imposed absolute liability upon Edison for damages resulting from fires that had Edison's electrical circuit as their source, and (4) *that there was no claim that Edison was negligent or at fault.* The parties also stipulated that the actual damage was approximately

$8000 instead of the approximate $11,000 claimed. [Cert. Rec. Vol. 1, Clk. Tr. pp. 170, 172-3].

During discovery and pretrial procedures and in connection with a motion for summary judgment filed by the Government a number of facts were produced, proof of which was in substance offered by Edison, and which Edison expected upon trial to be pertinent to its case. The District Court ruled on granting summary judgment, that:

(a) The special permit-contract imposed absolute liability as a matter of law,

(b) The special permit-contract, as so interpreted, was neither illegal nor unconstitutional,

(c) The proffered case, which would, in Edison's judgment, have proved the illegality and unconstitutionality of the now conceded discrimination, was irrelevant and immaterial [Cert. Rec., Vol. 2, Rep. Tr. pp. 23 and 24].

The District Court granted summary judgment [Cert. Rec. Vol. 1, Clk. Tr. p. 186], after refusing Edison's request for changes in, and additional findings of fact and conclusions of law [Cert. Rec. Vol. 1, Clk. Tr. p. 175].

The findings of fact and conclusions of law were contained in an order which was an opinion as well. [Cert. Rec. Vol. 1, Clk. Tr. pp. 179-185]. On appeal, the Court of Appeals affirmed the summary judgment. In so doing, the Court of Appeals held that the District Court had properly construed the special permit-contract as imposing absolute liability upon Edison, that

Edison's argument that the contract fell under the doctrine of unconstitutional conditions was incorrect, and that Edison had stipulated that the case was appropriate for decision on motion for summary judgment.

Edison filed a Peition for Rehearing and Request for Hearing in Banc. Denying both, the Court of Appeals concommitantly and importantly modified its earlier opinion and withdrew the statement that both parties had stipulated that the issue was appropriate for summary judgment (in accord with the record and the fact) *and conceded the fact of discrimination had been established* [Cert. Rec. Vol. 1, Court of Appeals decision and opinion on rehearing denial, pp. 3 and 1, respectively]. [Appendices A and B, *infra*].

The sum and substance of the entire record below is that without trial and on summary judgment Edison has been held to the standard of absolute liability in the use of national forest rights of way for its power lines, notwithstanding the conceded existent discrimination which favors municipally owned power systems under identical conditions. The Government's justification for this discrimination was solely that municipal public officials could not, under their local laws, validly sign such an absolute liability special permit-contract. Both the District Court and the Court of Appeals ignored the argument that if the federal law were valid and Constitutional it clearly overrode any inhibiting statutes under the Supreme Law of the Land Clause. *United States Constitution,* Art. VI, Cl. 2.

Reasons for Granting the Writ

1. The decision of the Court of Appeals is, as far as we have learned, the first decision in the United States passing upon the validity of the practice of the Forest Service in granting electrical power rights of way upon the discriminatory basis of absolute liability insofar as private power systems are concerned and with only the duty of reasonable care insofar as their public counterparts are involved. The reason for this paucity is eminently clear. This case represents the first attempt by the National Forest Service to impose absolute liability notwithstanding that these special permit-contracts have been in use for at least fifty years. This was conceded by the Government [Cert. Rec. Vol. 2, Rep. Tr. p. 20].

This is a pilot case and if the decisions below are affirmed, the Government will have no further need to prove negligence and a faultless private power company must pay for the Government's costs in fighting such forest fires, apparently, even without the right to trial and without the right to prove that such discrimination is illegal and unconstitutional.

The cost of such result must ultimately pass to all consumers. The anomaly results that consumers of privately produced electricity must pay more for it than the customers of municipal or publicly financed power companies, although both companies are equally free of fault in the construction, maintenance and use of identical facilities one of which accidentally causes a damaging fire.

The inequality that results from the decisions of the lower Courts in this case is thus not merely an inequality among companies, but a lack of equal protection of the laws among consumers, which, we submit, is the practical real effect of the discrimination. Since the rates are regulated in every case, and since the necessities of business require that such costs be carried forward to consumers in order to preserve the existence of the companies, the ultimate consumer of the private utility suffers the discrimination and the lack of equal protection, contrary to the Constitutional injunction. We take it as clearly conceded that no citizen is more entitled to equal protection.

The Court of Appeals affirmed the District Court which held that proof of the unreasonableness of the discrimination was immaterial and in substance upheld the Government's claim that the right to control the forest lands in this connection is an arbitrary and unlimited one (Brief of the United States in the Court of Appeals).

2. The decision of the Court of Appeals is in substance directly contrary to and in conflict with a series of cases involving the national forests which have been colloquially called "The Perko Cases."

Perko v. United States, (8th Cir. 1953) 204 F. 2d 446;

United States v. Perko, (D. Minn. 1952) 108 F. Supp. 315;

United States v. Perko, (D. Minn. 1955) 133 F. Supp. 564;

Perko v. Northwest Paper Co., (D. Minn. 1955) 133 F. Supp. 560;

United States v. Perko, (D. Minn. 1956) 141 F. Supp. 372;

Bydlon v. United States, (C. Clms. 1959) 175 F. Supp. 891.

3. The decisions of the Courts below permit the head of the department having jurisdiction over the National forests to make *special discriminatory regulations* granting easements for power line rights of way, although the sole statutory authority for granting such permits and easements at all is the Act of Congress granting the power only "under general regulations . . . applicable to any [every] citizen, association or corporation of the United States." (Brackets added). This excess of authority, while apparently not raising a Constitutional point, is illegal under the terms of the relevant federal statutes and imposes a federally illegal contractual term. The decisions are, therefore, contrary to the holdings of this Court establishing that, though not unconstitutional, a contract condition is void if beyond the power (measured by the federal statute in question) of the federal official imposing the condition.

See *Frost and Frost Trucking Co. v. Railroad Commission,* (1926) 271 U.S. 583;

See *Barron v. Burnside,* (1887) 121 U.S. 186, 197; and
Southern Pacific Company v. Denton, (1892) 146 U.S. 202.

4. If the Writ of Certiorari is granted we will also contend that the special permit-contract does not impose absolute liability as a matter of law. Technically, this error may not be a reason for granting *certiorari,* but rather a reason why the decision is wrong but we point it out here because it is the construction of the contract which gives rise to the holdings of legality and constitutionality which are involved in this Petition and which could not properly be adjudged on motion for summary judgment.

1. The Permit Contract Is Unconstitutional Under the Fifth Amendment

We here assume, *arguendo,* but without concession, that the contract was properly construed as a matter of law to impose absolute liability on Edison and that the contract was federally legal. The Government in its official instruments justified the discrimination *only* on the basis that local public officials *could not legally* sign the absolute liability contract. [See Forest Service Circulars U-161 and U-202, which together with the attesting certificate are printed in Appendix E, *infra* (Cert. Rec. Vol. 1; Clk. Tr. p. 168)].

In the order on rehearing the Court of Appeals said:

> "At the time of the hearing on motion for summary judgment no showing was made by appellant as to what exploration of the subject might produce *beyond establishing the existence of a discriminatory practice. This fact we here accept as conceded.*" [Emphasis added, Cert. Rec. Vol. 1, Order of June 12, 1969, Court of Appeals, p. 1]. [Appendix B]

It is clear from the record that not only was the fact of discrimination established but that upon summary judgment the evidence of the nature of the discrimination, its extremity, its unreasonableness and, therefore, its unconstitutionality was all deemed irrelevant and immaterial by the court of first instance. This irrelevancy and immateriality was affirmed *sub silentio* by the Court of Appeals.

The District Court said:

> "This is not a Constitutional argument of merit and . . . *offered evidence contained in the affidavits would be irrelevant and immaterial. And the fact that it exists does not militate against the granting of the summary judgment motion.*" [Emphasis added, Cert. Rec. Vol. 1, Rep. Tr. pp. 23 and 24].

The rights of way, the power lines, the fire cause, the lack of negligence are all identical but the Courts below have held that Edison, a privately owned power company, operating under state franchise, must pay the United States the cost of fighting the fire whereas, for example, the Department of Water and Power of the City of Los Angeles would not be required to pay. This, we contend, manifestly violates the equal protection concept now a part of the due process clause of the Fifth Amendment of the Constitution.

Bolling v. Sharpe, (1953) 347 U.S. 497;

Schneider v. Rusk, (1964) 377 U.S. 163;

Griswold v. State of Conn., (1965) 381 U.S. 479, (*per* Justice Black dissenting at 381 U.S. 517, Footnote 10).

That unequal protection which would violate the Fourteenth Amendment necessarily is a lack of due process under the Fifth Amendment has been even more broadly stated.

> *Todd v. Joint Apprenticeship Committee,* (N.D. Ill. 1963) 223 F. Supp. 12, 19.

We sought to establish in the District Court by affidavits, by stipulations, by government documents of which judicial notice is taken, and by other matters judicially noticed that the discrimination was unreasonable. We offered in substance so to prove. Our arguments were rejected and offers of proof held immaterial, Like argument was unavailing in the Court of Appeals. Our argument is:

(1) The positions of the two electric systems, privately owned and municipally owned, are identical with relation to the issues here, with the exception of the ownership of the "company".

(2) The discrimination in the use of federal lands can only be justified if it is reasonable and relevant to the federal interest in the project and the objectives thereof.

> *Ivanhoe Irrigation District v. McCracken,* (1958) 357 U.S. 275 [See particularly page 295].

(3) We have been wholly foreclosed from proof that the discrimination is unreasonable by a summary judgment and a holding that all the proof in the world would be immaterial and unreasonable.

(4) If the burden of proving unreasonability is upon Edison it must have the opportunity to prove that the conceded discrimination is unreasonable.

(5) Under a series of cases and opinions, it has been consistently held that the Forest Service must administer the national forests fairly and without discrimination.

"The Perko Cases," supra;

Jones v. Freeman, supra.

The proprietary concept of Government lands has here wholly terminated, if the doctrine ever had any real validity.

Takahashi v. Fish and Game Commission, (1948) 334 U.S. 410;

Purdy and Fitzpatrick v. California, (July 1, 1969) 71 Adv. Cal. Rep. 587.

Frost, etc. v. Railroad Commission, supra.

The Government relied on the concept that the Forest Service had unrestricted control of the national forests and that Edison could take the contract as it was presented to it or leave it. It cited as its principal support for this position *United States v. San Francisco, (the Hetch Hetchy case)* (1940) 310 U.S. 16. That case is clearly not applicable here. In the first place, the statute involved there, relating to disposition of Government owned power, contained a clear Congressional mandate concerning its disposition only to public entities; here the statute involves an equally clear Congressional mandate to permit use of National Forest lands to every citizen and corporation under general regulations only.

The doctrine of unconstitutional and illegal conditions clearly establishes that the view of Senator Walsh,

> "We may impose just exactly such conditions as we see fit and San Francisco can take the grant with all those conditions or can let it alone;"

is not *now* the law of the land.

Further, in the *Hetch Hetchy* case the Court did not consider the validity of the statute from the standpoint of due process or equal protection at all, that case having been decided prior to the recognition of equal protection as a necessary part of due process. The only Constitutional consideration in *Hetch Hetchy* was Article IV, Section 3, Clause 2, of the Constitution and a concept that the subject matter was the appropriate business of Congress.

United States v. San Francisco (1949) 310 U.S. 16, 26, 29.

In the official annotated edition of the Constitution this case is cited only under the above mentioned article and not even mentioned in the consideration of the Equal Protection or Due Process clauses.

(6) No strength is added to the Government's case because the condition of absolute liability was included in a contract. It is, we respectfully submit, now beyond argument that the Government may not by means of contract impose a condition which it could not directly impose.

Frost v. Railroad Commission, supra;
Harman v. Forssennius, (1965) 380 U.S. 528;
Garrity v. New Jersey, (1967) 385 U.S. 493;
Thorpe v. Housing Authority, (1967) 386 U.S. 670, 679.

(7) The lack of reasonability of the discrimination is emphasized by the practical fact that Edison is essentially unable to convey electricity from its sources to the consumers it is bound to serve without crossing the national forests. Somewhat ironically it may be noted

that the very fire here involved had its source on a power line which crossed the national forest for the purpose of serving the National Forest Service, an Edison customer, itself.

Truly in accepting a contract with the asserted condition of absolute liability Edison was between the rock and the whirlpool. [See, *Frost, supra*]. Either it could accept such a contractual condition or not traverse the national forests and so not furnish the electrictiy which its state franchise requires it to supply to all comers under its tariffs including, of course, the National Forest Service. Appendix F is a map showing the service area of the Edison company, the national forests, the largest cities, some vital military bases supplied by Edison in the area and the basic electrical sources of the company. We invite inspection as the demonstration of the point. The lack of reasonability of the conceded discrimination is also strikingly illustrated in the case of a power line owned in common by a private company and by a municipality. The existence of such a situation was argued and proved by judicial notice to the Courts below.*

We contend that private utilities and their consumers, like policemen, "teachers and lawyers are not relegated to a watered-down version of Constitutional rights."

Semble, *Garrity v. New Jersey, supra,* 385 U.S. 493 at 500.

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*The exact situation occurred in the Wayne National Forest in Ohio. In Edison's brief to the Court of Appeals, the facts, of which the Court took judicial notice, were pointed out. It is important to note, too, that the Government's rule on the subject (Appendix E) covers situations where the power line is owned by a private company and cases where it is owned by a municipal company, but has no rule at all for situations where the line is owned in common between a public and a private company. What rule can then be applied?

The only case cited in the opinion of the Court of Appeals, *Springfield Gas v. Springfield,* (1921) 257 U.S 66 is readily distinguishable. This case was a rate case and has been uniformly held by this Court to mean only that it is not unconstitutional for rate making of a municipally owned public utility to be governed by the municipality, although privately owned electric companies have their rates controlled by a state public utility commission.

Puget Sound Power & Light Company v. Seattle, (1934) 291 U.S. 619;

City of Seymour v. Texas Electric Service Company (5th Cir. 1933) 66 F. 2d 814.

The inherent equality as providers for the public weal of the municipal electric utility which pays no taxes and the taxpaying privately owned utility has most recently again been stressed by this Honorable Court.

Cipriano v. City of Houma, (June 16, 1969) 37 U.S. Law Week 4598, 4599.

We cannot think there is a more important concept than that the Government afford equal protection in the administration of one of our most precious resources, the national forest. The preservation of the forest, however, must surely yield to the basic concept of our Government, if ever there is a conflict between the two *desiderata.*

> "There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and as Heaven does its rains, showers its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing."
>
> Andrew Jackson, *Veto of the Bank Bill,* July 10, 1832.

2. The Decision Below Conflicts With Other Circuit Decisions and Decisions of This Court

We have already adverted to the conflict, above.

3. The Forest Service Imposed Obligation of Absolute Liability Is Federally Illegal

The act of the Forest Service in imposing absolute lability under a special regulation for privately owned utilities is federally illegal, even if it is not unconstitutional. As mentioned above, the controlling statute in this case and the source of the Government's authority is either the Act of 1901 or the Act of 1911, as amended. These two acts in pertinent part are found in the United States Code at 16 U.S.C. § 522 and 16 U.S.C. § 523, respectively. Both statutes empower a public official to grant rights of way over forest lands for electrical transmission and distribution lines only *under general regulations to be fixed by him.* "General" denotes "that which pertains to all or almost all" or "affecting or applicable to each and all of the members of a class, kind or order; universal within the limits of the reference; as a general law."

Webster's New International Dictionary, 2nd Ed. (1956) pp. 1043-1044.

The generality of the statute is emphasized by the inclusion in the grant of the words which provide that the grantee under such general regulations must be "any citizen, association or corporation of the United States." (16 U.S.C.A. § 523, line 14).

Under a series of cases, the rule is fixed that regulatory activities of a federal public official which exceed

his statutory authority are void. The earliest case is *Wilson v. North Carolina,* (1898) 169 U.S. 586, but the leading case is *Federal Trade Commission v. Raladam Company,* (1931) 283 U.S. 643. *Raladam* has been repeatedly cited by this Honorable Court and never more forcefully, we think, than in *Howard v. Lyons,* (1959) 360 U.S. 593.

See also:

Harmon v. Brucker, (1958) 355 U.S. 579;

Barr v. Matteo, (1959) 360 U.S. 564;

Pan American World Airways Inc. v. United States, (1963) 371 U.S. 296, 307.

A very recent Circuit decision *Community Blood Bank of the Kansas City Area, Inc. v. F.T.C.,* (8th Cir. 1969) 405 F. 2d 1011, 1013, in which the Commission did not seek *certiorari,* appears to be the most recent federal decision so holding.*

Conclusion.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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*Counsel for plaintiff has informed us that the last day to file a Petition for Certiorari was April 10, 1969, and that the Federal Trade Commission allowed the period to expire without petition for the Writ.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit

United States Court of Appeals, for the Ninth Circuit.

Southern California Edison Company, a corporation, Appellants, vs. United States of America, Appellee. No. 22,492.

[April 30, 1969]

On Appeal from the United States District Court, for the Central District of California.

Before: HAMLEY, MERRILL and CARTER, Circuit Judges.

MERRILL, Circuit Judge:

The United States brought this action to recover from appellant expenses incurred by the Forest Service in extinguishing a forest fire originating from appellant's right of way located in the San Bernardino National Forest. It was stipulated that the fire in question was electric in source, that it emanated from appellant's transmission lines within the National Forest but that it was not the result of appellant's negligence. This appeal is taken from summary judgment rendered in favor of the United States.

The Government claim was based on the provisions of the special use permit issued to appellant October 8, 1962, which granted a fifteen-foot right of way within the National Forest to maintain and operate an electrical transmission line. Condition 8 of the permit imposes on the permittee liability for damage resulting from the permittee's use. In the printed form

of permit condition 8 requires the permittee to use due diligence and obligates it to pay the United States for any damage resulting from negligence. In appellant's permit this paragraph was stricken and a typewritten provision was inserted in its place, reading: "The permittees shall pay the United States for any damages resulting from this use."

Appellant contends that this language is ambiguous and should be strictly construed against the United States, and that as so construed it should not be read as imposing liability without fault.

We do not find the language ambiguous, particularly when read against that for which it was substituted. As we read it, it clearly and unambiguously imposes liability under the stipulated facts of this case.

It is conceded that the established Government practice in issuing special use permits for power transmission rights of way is to use the printed form of condition 8 in dealing with publicly owned power companies but to use the typewritten substitution in dealing with privately owned companies such as appellant. Appellant contends that this practice unjustifiably discriminates against privately owned power companies in violation of the due process clause of the Fifth Amendment. We cannot agree.

The Government points out that the United States is not subject to the equal protection clause of the Fourteenth Amendment and argues that the limits of discrimination permitted by the due process clause are wider in scope than those of the equal protection clause. We need not deal with this point of distinction. Even under the equal protection clause

the separate classification of privately and publicly owned utilities has long been held justifiable.

In *Springfield Gas Co. v. Springfield,* 257 U.S. 66, 71 (1921), where municipal corporations were, by Illinois law, excepted from the rate requirements of the State Public Utilities Act, it was held that the equal protection clause was not offended, the Court stating:

> "It is unnecessary to refer to the numerous cases upon classification by state laws in order to show that the distinction in question here is very far from being so arbitrary that we can pronounce it bad."[1]

Appellant complains that it was, by the summary action of the District Court, precluded from digging deeper into the nature of the discrimination here involved. This complaint comes too late. The burden of overcoming the presumption of Constitutionality was with appellant. It was stipulated in the District Court that the issue was an appropriate one for summary judgment. No showing was made by appellant in its affidavits submitted to the District Cort as to what exploration of the subject might produce. Appellant thus failed to show a genuine issue for trial. Rule 56(e), Fed. R.Civ.P.

Judgment affirmed.

Opinion modified by order of June 12, 1969.

---

[1]The Court had earlier noted, 257 U.S. at page 70:

> "The private corporation, whatever its public duties, is organized for private ends and may be presumed to intend to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on theory that thereby the public welfare will be subserved. So far as gain is an object it is a gain to a public body and must be used for public ends. Those who manage the work cannot lawfully make private profit their aim, as the plaintiff's directors not only may but must."

APPENDIX B.

Order.

In the United States Court of Appeals, for the Ninth Circuit.

Southern California Edison Company, a corporation, Appellant, vs. United States of America, Appellee. No. 22,492.

Before: HAMLEY, MERRILL and CARTER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc but to modify the last paragraph of the opinion to read as follows:

> "Appellant complains that it was, by the summary action of the District Court, precluded from digging deeper into the nature of the discrimination here involved. At the time of the hearing on motion for summary judgment no showing was made by appellant as to what exploration of the subject might produce beyond establishing the existence of a discriminatory practice. This fact we here accept as conceded. Appellant has thus failed to show a genuine issue for trial. Rule 56-(e), Fed.R..Civ.P.
>
> Judgment affirmed."

The full court has been advised of the suggestion for an in banc rehearing and of the proposal of the panel and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App. P. 35(b).

The petition for a rehearing is denied. The suggestion for a rehearing in banc is rejected. It is ordered that the last paragraph of the opinion be modified to read as above set forth.

APPENDIX C.

A.

31 Stat. 790, the Act of February 15, 1901, c. 372, 6 U.S.C. § 522.

Rights-of-Way for Electrical Plants.

The Secretary of Agriculture is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the national forests for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder for any one or more of the purposes herein named. Such permits shall be allowed within or through any national forest, only upon the approval of the chief officer of the department under whose supervision such national forest falls and upon a finding by him that the same is not incompatible with the public interest. All permits given

hereunder for telegraph and telephone purposes shall be subject to the provision of sections 1-6 and 8 of Title 47 regulating rights of way for telegraph companies over the public domain. Any permission given by the Secretary of Agriculture under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any national forest.

B.

36 Stat. 1253, the Act of March 4, 1911, c. 238, as Amended by 66 Stat. 95, the Act of May 27, 1952, c. 338, 16 U.S.C. § 523.

Rights-of-Way Through National Forests for Power and Communications Facilities.

The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the national forests of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-

way herein granted or any one or more of the purposes herein named: *Provided,* That such right-of-way shall be allowed within or through any national forest only upon the approval of the chief officer of the department under whose supervision or control such national forest falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all or any part of such right-of-way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

Any citizen, association, or corporation of the United States to whom there has been issued a permit prior to March 4, 1911, for any of the purposes specified herein under any law existing at that date, may obtain the benefit of this section upon the same terms and conditions as shall be required of citizens, associations, or corporations making application under the provisions of this section subsequent to said date.

APPENDIX D.

Special Use Permit.

United States Department of Agriculture, Forest Service, SPECIAL USE PERMIT Act of June 4, 1897, or February 15, 1901. This permit is revocable and nontransferable.

Name of Permittee SOUTHERN CALIFORNIA EDISON COMPANY.

Date of Permit, October 8, 1962.
Kind of Use, Minor Transmission Line.
File Code 2750 (5600).
Region 5.
State, California.
Forest, San Bernardino.
Ranger District, Cajon.

Permission is hereby granted to SOUTHERN CALIFORNIA EDISON COMPANY of P. O. Box 351, Los Angeles 53, California, hereinafter called the permittee, to use subject to the conditions set out below, the following described lands or improvements: a right-of-way fifteen (15) feet in width on portions of government land within the following described Townships and Ranges:

T. 1 N., R. 3 W.,
T. 1 N., R. 4 W.,
T. 1 N., R. 5 W.,
T. 1 N., R. 6 W.,
T. 1 N., R. 7 W.,
T. 2 N., R. 4 W.,
T. 2 N., R. 5 W.,
T. 2 N., R. 6 W.,

T. 2 N., R. 7 W.,
T. 3 N., R. 5 W.,
T. 3 N., R. 6 W.,
T. 3 N., R. 7 W., SBBM.

and as shown more particularly on maps on file in the Forest Supervisors' office and such extensions within the same area as are hereafter provided for.

This permit covers .... acres and/or 8.82 miles and is issued for the purpose of: constructing, maintaining and operating a general power distribution area.

The exercise of any of the privileges granted hereby constitutes acceptance of all the conditions of this permit.

1. In consideration for this use, the permittee shall pay to the Forest Service, U.S. Department of Agriculture, the sum of Forty-five and no/100 Dollars ($45.00) for the period from January 1, 1962, to December 31, 1962, and thereafter annually on January 1, at the rate of $5.00 per mile or fraction thereof., ... Dollars ($.....): *Provided, however,* Charges for this use may be made or readjusted whenever necessary to place the charges on a basis commensurate with the value of use authorized by this permit.

2. Construction or occupancy and under this permit with .... months, and construction, if any, shall be completed in .... months, from ..... of the permit. This use shall be actually exercised at least 365 days each year, unless otherwise authorized in writing.

3. Development plans; layout plans; construction, reconstruction, or alteration of improvements; or revision of layout or construction plans for this area must

be approved in advance and in writing by the forest supervisor. Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed. Timber cut or destroyed will be paid for by the permittee as follows: Merchantable timber at appraised value; young-growth timber below merchantable size at current damage appraisal value; *provided* that the Forest Service reserves the right to dispose of the merchantable timber to others than the permittee at no stumpage cost to the permittee. Trees, shrubs, and other plants may be planted in such manner and in such places about the premises as may be approved by the forest officer in charge.

4. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

5. This permit is subject to all valid claims.

6. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and muncipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

7. The permittee shall take all reasonable precautions to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge of his authorized agent.

8. ~~The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.~~ [See Attached.]

9. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

10. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

11. Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures nad improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for he cost of their removal and restoration of the site.

12. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid

legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements, this permit shall be subject to cancellation. But if the person to whom title to said improvements shall have been transferred in either manner above provided is qualified as a permittee and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy of the premises may be authorized by permit to him if, in the opinion of the issuing officer or his successor, issuance of a permit is desirable and in the public interest.

13. In case of change of address, the permittee shall immediately notify the forest supervisor.

14. The temporary use and occupancy of the premises and improvements herein described may be sublet by the permittee to third parties only with the prior written approval of the forest supervisor but the permittee shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

15. This permit may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service.

16. In the event of any conflict between any of the preceding printed clauses or any provision thereof and any of the following clauses or any provisions thereof, the preceding printed clauses will control.

17. This permit is accepted subject to the conditions set forth above and to conditions 18 to 32 attached hereto and made a part of this permit.

Date October 8, 1962.

Signature of Issuing Office.

Forest Supervisor By D. M. Tucker.

Title, Acting Forest Supervisor.

8. The permittee shall ..... the United States for any damage resulting from this use.

18. Unless sooner terminated ~~or revoked~~ by the Regional Forester, this permit shall terminate and become void at the expiration of ten years from the date of issuance but a new permit to occupy and use the same National Forest land may be granted provided the permittee will comply with the then existing laws and regulations governing the occupancy and use of National Forest lands of power purposes, and shall have notified the Regional Forester not less than two (2) years prior to said date that such permit is desired.

19. This permit confers no rights upon the permittee to use this right-of-way for purposes other than for the construction, maintenance and operation of a transmission line thereon.

20. Violation of any of the conditions of this permit shall be sufficient cause for its revocation; provided, however, that this permit will not be deemed to be terminated except upon formal revocation thereby by the Regional Forester, Forest Service, or his authorized representative, and not until the permittee shall have had a reasonable time—not to exceed ninety (90) days—within which to show cause why such revocation should not be made.

21. The permittee shall allow, whenever requested by the Forest Officers, a way across the land covered by this permit for the free ingress and egress of Forest Officers and for users of National Forest land and purchasers of National Forest products.

22. The permittee shall allow officers and employees of the United States free and unrestricted access in, through and across the said project and project works in the performance of their official duties; and shall allow the Forest Service without charge, to construct, or permit to be constructed in, through and across the said project, railroads, chutes, roads, trails, conduits and other means of transportation not inconsistent with the enjoyment of said project by the permittee for the purpose herein set forth.

23. The permittee shall clear designated portions of the power line right-of-way, and keep them clear as required by the Forest Officer in charge; shall trim all branches of trees in contact or near contact with the line and on or adjacent to the right-of-way shall remove all dead snags and all trees leaning toward the line; and which are deemed hazardous or might fall in contact with the line; and shall observe such other precautions against fire as may be required by the Forest Officer in charge; all waste material shall be burned or otherwise disposed of to the satisfaction of the Forest Officer in charge. The clearing width shall be restricted to that necessary for safe transmission unless the specific permission of the Forest Supervisor for a greater clearing width is obtained.

24. The permittee shall do everything reasonably within its power and shall require its employees, contractors, and employees of contractors to do everything

reasonably within their power, both independently and upon request of officers of the Forest Service, or other agents of the United States to prevent and suppress fires on or near the lands to be occupied under this permit during the period of construction.

25. A fire prevention and control plan adequate in the judgment of the Forest Supervisor to the risks and hazards of this use shall be prepared and placed in effect by the permittee. This plan shall provide for necessary "standby" fire control equipment, and for the current disposal of trash.

26. The transmission line shall be designed and constructed in accordance with the accepted standards and specifications for transmission lines of similar voltages, capacity and purpose as set forth in the Rules and Regulations of the California Public Utilities Commission, its General Order No. 95 or subsequent orders it may issue before construction takes Place. The permittee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its power line and telegraph, telephone, signal or other power lines heretofore constructed and not owned by the permittee, and shall also place and maintain suitable structures and devised to reduce to a reasonable degree the liability of any structures or wires falling and obstructing traffic or endangering life on highways and roads, in a manner satisfactory to the Forest Service.

27. The scenic and aesthetic values of the right-of-way and adjacent land shall be protected as far as possible consistent with the authorized use, during construction, operation and maintenance of the line.

28. The permittee shall make provision, or shall bear the reasonable cost (as determined by the Regional Forester) of making provision, for avoiding inductive interference between any project transmission line or other project work constructed, operated, or maintained under this permit and any radio installation, telephone line, or other communication facility installed or constructed before construction of such project transmission line or other project work, and owned, operated or used by the Forest Service in administering the National Forests and land under its jurisdiction. The foregoing provisions of this article shall also relate to any radio installation, telephone line, or other communication of facility installed or constructed by the United States after construction of such project transmission line or other project work. None of the provisions of this article are intended to relieve the permittee from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive interference.

29. That in respect to the regulation by any competent public authority of the service to be rendered by the permittee, or of the price to be charged therefor, and in respect to any purchase or taking over of the properties or business of the permittee, or any part thereof, by the United States or by any State within which such properties are situated or business carried on in whole or part, or by any municipal corporation of such State, no value whatsoever shall at any time be assigned to or claimed for the permit or for the occupancy or use of National Forest lands granted thereunder, nor shall the permit of such occupancy and use ever be estimated or considered as property upon which

the permittee shall be entitled to earn or receive any return, income, price, or compensation whatsoever.

30. Those sections of the right-of-way allowed by this permit which are withdrawn by the Secretary of the Interior under Section 24 of Federal Power Act and designated as a Power Site Withdrawal are subject to use at any time in connection with the development of water power. This permit, therefore, is issued with the specific understanding that it shall not interfere with such development, and may, if necessary, be terminated upon three (3) months notice that in the judgment of the Federal Power Commission the lands occupied are needed for use in connection with the generation of hydro-electric power or any other purpose contemplated by the Acts under with the lands have been withdrawn. It is further understood that the permittee assumes all risks in case it is used for power purposes, and that the permittee can look for no compensation in that event.

31. Extensions as necessary currently may be made to the line authorized by this permit under the following conditions: (1) that the extensions are located within the boundaries of the distribution area which will be known as the Lytle Creek Distribution Area; (2) that before November 10 of each year, the permittee will report to the Forest Supervisor the actual mileage constructed to date and submit a map conforming to the requirements of the map forming a part of the application for original permit and showing any changes in location made during the year; (3) that the construction of any such expansion shall not be started until specifically approved in writing by the District and until conflicts in right-of-way with other special

uses have been settled; and (4) that power or lighting service to any cabin, house, or other structure within the national forest boundaries will not be started until the wiring of such structures have been approved by the forest supervisor or his authorized representative.

32. This permit shall have no force and effect until the permittee has signified its acceptance of its provisions and conditions by signing below and returning all copies to the Forest Supervisor, 157 West Fifth Street, San Bernardino, California for final approval.

We have read the foregoing permit and agree to accept and abide by its terms and conditions.

Date: Oct. 12, 1962.

SOUTHERN CALIFORNIA EDISON COMPANY

By J. H. MEAD

Title, Vice-President

APPENDIX E.

United States of America
Department of Agriculture
Washington

I, ORVILLE L. FREEMAN, Secretary of Agriculture of the United States, pursuant to Title 28, United States Code, Section 1733, do hereby certify that the annexed copy, or each of the specified number of annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described:

1. Forest Service Circular No. U-161 dated November 26, 1947.

2. Forest Service Circular No. U-202 dated March 11, 1949. In testimony whereof I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia, this 23rd day of May, 1967.

/s/ Orville L. Freeman
Secretary
By /s/ Howard V. Campbell
Assistant General Counsel
(Signed pursuant to the authority of 23 F.R. 3336)

UNITED STATES DEPARTMENT OF AGRICULTURE
Forest Service
[Seal]

Washington 25, D.C.

Address Reply to Chief Forest Service and Refer to U SUPERVISION Policy Uses.

November 26, 1947

Circular No. U-161

Regional Foresters
and Director, Tropical Region

Dear Sir:

Standard clause 6 of our special use permit is in effect an unlimited liability clause since it binds the permittee to reimburse the Government for any damage to the United States as a result of the use of Government land by the permittee.

It is beyond the authority of officials of states, counties, municipalities or other governmental agencies to accept a permit which so binds the political subdivision or agency they represent.

You are authorized to substitute the following clause for standard clause 6 in permits to states, counties, municipalities or other governmental agencies:

> The permittee agrees to take all reasonable precaution to avoid damage to timber, young growth and watershed cover and diligently to undertake suppression action in the event of fire resulting from the exercise of the privileges herein granted.

Standard clause 6 should be retained in all other permits.

The Manual will be so amended at the first opportunity.

Very sincerely yours,
LYLE F. WATTS, Chief
By C. Granger

UNITED STATES DEPARTMENT OF AGRICULTURE

Forest Service

[Seal]

Washington 25, D.C.
March 11, 1969

Address Reply to Chief, Forest Service and Refer to U SUPERVISION Policy Uses.

Circular No. U-202

Regional Foresters
and Director, Tropical Region

Dear Sir:

Reference is made to Circular Letters U-191 and U-161. The present clause 6, Special Use Permit, Form 832 reads:

> "The permittee shall pay the United States for any damage resulting from this use."

This is an unlimited liability clause, commonly called an "insurance clause." It protects the United States against all damage resulting from the use, including damage beyond the control of the permittee.

It does not seem necessary to use this clause in all special use permits. Hereafter, the policy set forth below will govern.

1. The following clause will replace the present clause 6 in the standard Special Use Permit, Form 832, and will also be used in the ordinary Term Permit, Form 854.

   A. The permittee will exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit

and will pay the United States for any damage resulting from the violation of the terms of this permit or any law or regulation applicable to the national forests by the permittee, his agents, or employees, or through negligence of the permittee, his agents, or employees, when acting within the scope of their employment.

(Over)

Regional Foresters and Director, Tropical Region-3/11/49

2. Special uses which involve special hazards, usually including such uses as power lines, gas and oil pipe lines, railroads, smelters, or other hazardous uses, should include the following clause ("insurance clause"):

   B. "Notwithstanding the provisions of other clauses of this permit requiring precautionary measures for the protection of the national forest, the permittee shall pay the United States for any damage resulting from this use, regardless of whether such damage is the result of negligence or of the violation of any of the provisions of this permit or of applicable regulation or law.

   This clause is substantially the same as the present clause 6 in its effect but has been reworded by the Solicitor in order to avoid possible legal difficulties arising from the addition of other clauses to the permit.

3. In permits to States, counties, municipalities, or other Government agencies, the following clause

may be used. *Note* that this is a broadening of the clause authorized in Circular Letter U-161.

C. The permitte agrees to take all reasonable precaution to avoid damage to property and resources of the United States, and diligently to undertake suppression action in the event of fire resulting from the exercise of the privileges herein granted.

4. It is the responsibility of the regional forester to see that the "insurance clause," B above is, used in cases where it is just and equitable that the United States be fully protected against special hazards.

5. In permits which include clause A or C above, additional damage clauses may be used to protect the United States against specific sources of damage inherent in the particular use authorized.

Note: Special damage clauses are not necessary or desirable when clause B is used, since that clause protects the United States from any damage. With clause A or C it may often be desirable to cover special hazards—either by an additional damage clause or by additional stipulations in the permit which, if complied with, will prevent damage. See Manual instructions page NF-H5(7) relating to changing clauses in special use permits.

When Forms 832 and 854 are revised clause A will be made standard, since it is expected that it will be used in the great majority of cases.

3-Regional Foresters and Director, Tropical Region-3/11/49

The clauses A, B, and C are, of course, conflicting in the amount of liability placed on the permittee and should never be used in the same permit.

In accordance with the above policy, you are authorized to delete present clause 6 in the Special Use Permit, Form 832, and to substitute either clause A or C, in all future permits.

The substitution of clauses for old clause 6 in existing terminable permits presents a problem because the new clauses A and C are less protective and it might be argued that we are modifying a contract to the detriment of the United States. The new clauses should be substituted for clause 6 in the existing terminable, paid permits as of the next payment date and in existing free use permits on the next anniversary of the permit. This may be accomplished by a mimeographed notice, a sample of which is attached. Notices must be signed by a forest officer of equal or higher rank than the one issuing the permit. All notices must be signed; mimeographed signatures are not acceptable.

This procedure differs from the simpler procedure proved for grazing permits (See Circular Letter G-325), because all special use permits will not be amended in the same manner. It is therefore necessary that each amendment be specifically for a certain permit. Otherwise it might be possible for some permittee whose permit should contain clause B to claim that he had re-

ceived notice that clause A was effecttive. Every effort was made to adopt the simpler procedure, but it could not safely be done.

If permittees ask about the effect of the change on them it should be pointed out that present clause 6 is an all-inclusive damage clause and subjects them to much more liability than either A or C.

Clause B is just as all-inclusive as old clause 6 and the additional wording is only for technical reasons.

Existing term permits, Form 854, cannot be revised until the term expires, or unless the permit is otherwise legally terminated.

When the present Forms 832 and 854 are revised to include clause A as the standard damage clause, you are authorized to delete it and to substitute clause B or C in accordance with the above policy.

You will be advised by separate letter with reference to the damage clause in grazing permits and application forms.

Very sincerely yours,

LYLE F. WATTS, Chief
By C. Granger

Attachment
(Designation)

Notice is hereby given that permission granted by the above-designated special use permit shall hereafter be subject to the condition that the following clause is hereby substituted for clause 6 of that permit:

(Quote here clause A, B, or C of Circular Letter U-202, as the case may be.)

.....

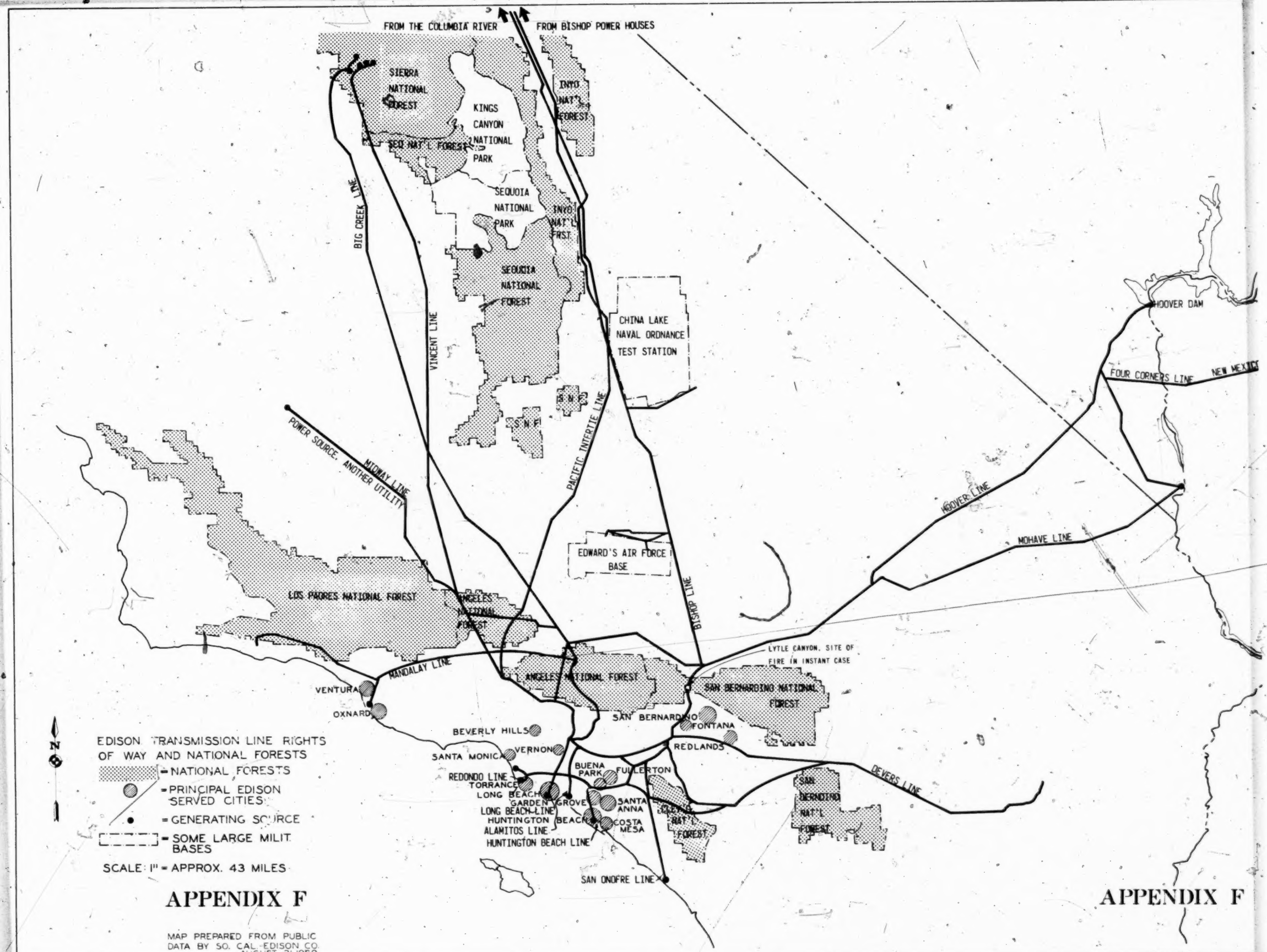
(Title)

.....

(Date)

P.S.—Permittees desiring additional information about this substitution of clauses and the reasons therefor should write to the forest supervisor or the forest ranger.

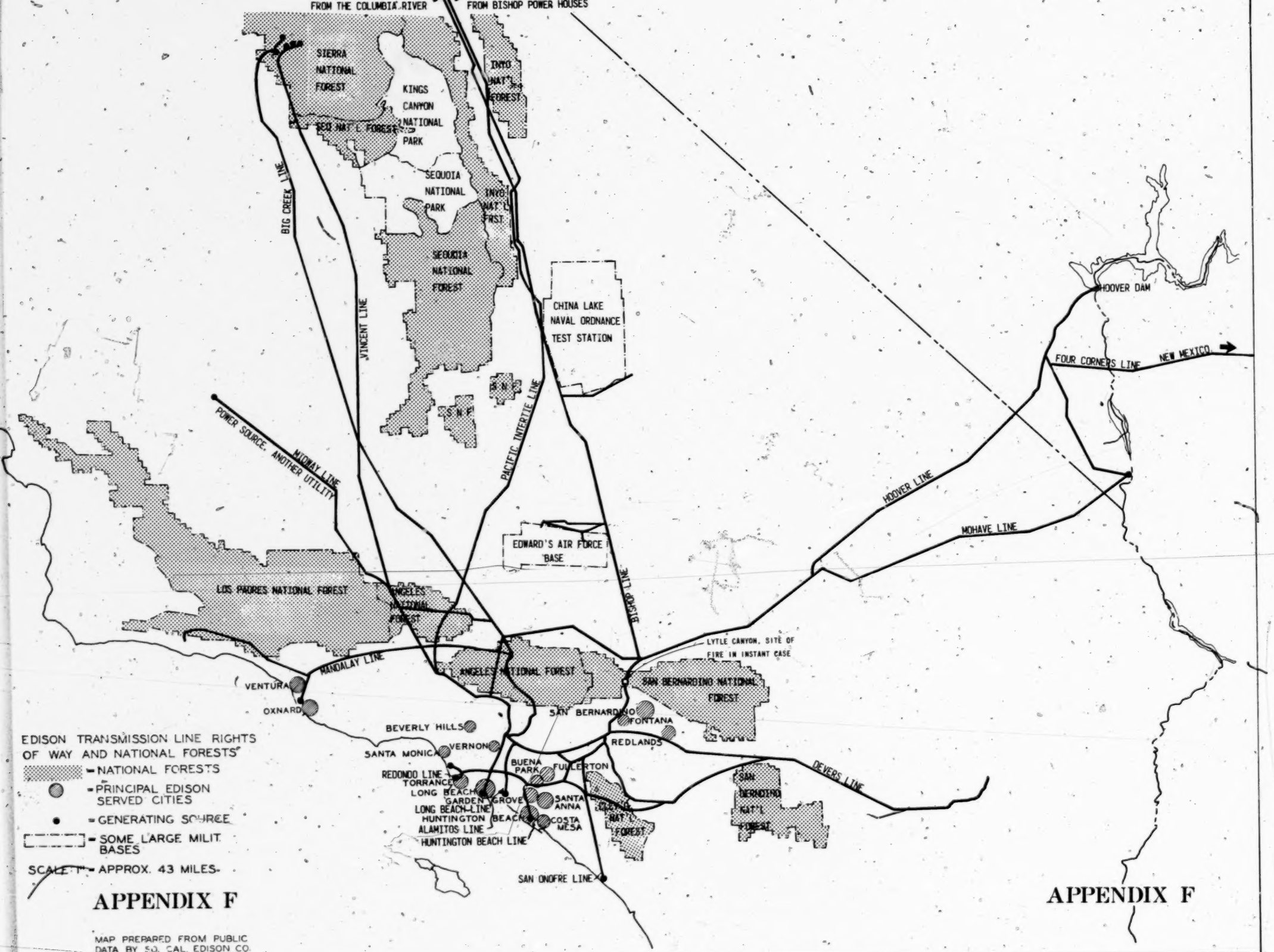
APPENDIX F.



APPENDIX F

MAP PREPARED FROM PUBLIC DATA BY SO. CAL. EDISON CO.
AUGUST 21, 1969

APPENDIX F


FROM THE COLUMBIA RIVER
FROM BISHOP POWER HOUSES
SIERRA NATIONAL FOREST
KINGS CANYON NATIONAL PARK
SEQ NAT L FOREST
INYO NAT'L FOREST
SEQUOIA NATIONAL PARK
INYO NAT'L FRST
SEQUOIA NATIONAL FOREST
BIG CREEK LINE
VINCENT LINE
CHINA LAKE NAVAL ORDNANCE TEST STATION
PACIFIC INTERTIE LINE
POWER SOURCE, ANOTHER UTILITY
MIDWAY LINE
EDWARD'S AIR FORCE BASE
BISHOP LINE
HOOVER DAM
FOUR CORNERS LINE
NEW MEXICO
HOOVER LINE
MOHAVE LINE
LOS PADRES NATIONAL FOREST
ANGELES NATIONAL FOREST
LYTLE CANYON, SITE OF FIRE IN INSTANT CASE
SAN BERNARDINO NATIONAL FOREST
MANDALAY LINE
VENTURA
OXNARD
BEVERLY HILLS
VERNON
SAN BERNARDINO
FONTANA
REDLANDS
SANTA MONICA
BUENA PARK
FULLERTON
REDONDO LINE
TORRANCE
LONG BEACH
GARDEN GROVE
SANTA ANNA
LONG BEACH-LINE
HUNTINGTON BEACH
COSTA MESA
ALAMITOS LINE
HUNTINGTON BEACH LINE
DEVERS LINE
SAN BERNDINO NAT'L FOREST
SAN ONOFRE LINE
EDISON TRANSMISSION LINE RIGHTS OF WAY AND NATIONAL FORESTS
= NATIONAL FORESTS
= PRINCIPAL EDISON SERVED CITIES
= GENERATING SOURCE
= SOME LARGE MILIT. BASES
SCALE 1" = APPROX. 43 MILES
APPENDIX F
MAP PREPARED FROM PUBLIC DATA BY SO. CAL. EDISON CO. AUGUST 21,1969
APPENDIX F

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 556

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A), is not yet reported, and was modified by order of that court (Pet. App. B). The unreported opinion of the district court appears in the record at pages 179–185.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1969. A petition for rehearing was denied on June 12, 1969. The petition for a writ of certiorari was filed on September 3, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Agriculture, as guardian of the national forests, may require a private utility

364-785—69

seeking a right of way across a national forest to assume absolute liability for the costs of suppressing electrically-caused fires, while not requiring publicly-owned companies to assume such liability.

CONSTITUTION AND STATUTES INVOLVED

Article IV, Section 3, clause 2, of the United States Constitution, reads in pertinent part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *.

The Organic Administration Act of June 4, 1897, 30 Stat. 35, as amended, 16 U.S.C. 551, provides in pertinent part:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside * * * and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction * * *.

The Act of February 15, 1901, 31 Stat. 790, as amended, 16 U.S.C. 522, provides in pertinent part:

> The Secretary of Agriculture is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the national forests for electrical plants, poles, and lines for the generation and distribution of electrical power, * * *.

The Act of March 4, 1911, 36 Stat. 1253, as amended, 16 U.S.C. 523, provides in relevant part:

> The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the national forests of the United States for electrical poles and lines for the transmission and distribution of electrical power * * *: *Provided,* That such right-of-way shall be allowed within or through any national forest only upon the approval of the chief officer of the department under whose supervision or control such national forest falls, and upon a finding by him that the same is not incompatible with the public interest: * * *.

STATEMENT

The United States brought this action to recover from Southern California Edison Co. (Edison) expenses the Forest Service incurred in extinguishing a forest fire in the San Bernardino National Forest. It was stipulated that the fire was electric in source, that it emanated from Edison's transmission lines within the National Forest, and that it was not the result of Edison's negligence.

The government's claim was based on the provisions of the special use permit which allowed Edison a right of way through the National Forest for operation and maintenance of an electrical transmission line. The permit is granted on the permittee's agreement to abide by the terms of a printed form, of

which condition 8 governs the permittee's liability for damage resulting from the permittee's use. As printed, condition 8 requires a permittee to use due diligence, and obliges it to pay the United States for any damage resulting from its negligence. In Edison's permit, this paragraph was stricken and a typewritten provision was inserted in its place, reading: "The permittee shall pay the United States for any damage resulting from this use." The established government practice in issuing special use permits for power transmission rights of way is to use the printed form of condition 8 in dealing with publicly-owned power companies, but to substitute the typewritten provision in dealing with privately-owned companies. Edison is privately owned.

On motion for summary judgment, the district court held for the government. It found that the substitute provision clearly and unambiguously imposed absolute liability on Edison and rejected as without merit Edison's assertion that the imposition of absolute liability is an unjustifiable discrimination against privately-owned utilities. The court of appeals affirmed, reasoning that the separate classification of privately- and publicly-owned utilities has long been held justifiable. In denying Edison's petition for rehearing and suggestion for rehearing *en banc*, the court of appeals noted that Edison had been unable to suggest any showing it could make on trial of the case, beyond the conceded, and insufficient, fact that a practice of discriminating between publicly- and privately-owned utilities exists (Pet. App. B).

ARGUMENT

The decision of the court of appeals is plainly correct and does not conflict with the controlling

decisions of this Court or the decisions of any court of appeals.[1] Accordingly, there is no occasion for further review.

1. The United States may require that power line permittees assume absolute liability for costs of suppressing electrically-caused fires as a condition of granting the permit. It is the owner of the public lands. Article IV, Section 3, of the Constitution commits the control and disposition of these lands to Congress. This Court has consistently recognized the plenary power of Congress to dispose of public lands upon such terms and conditions as the public interest requires. *United States* v. *California*, 332 U.S. 19, 27; *Ruddy* v. *Rossi*, 248 U.S. 104, 106; *Gibson* v. *Chouteau*, 13 Wall. 92, 99. This power over the government's property includes the power completely to deny others the right to use it, or to permit use only on stated terms. Thus, it can require as a condition to permitting construction of a dam upon a navigable stream that the licensee agree to sell the dam to the government at less than fair value. *United States* v. *Appalachian Power Co.*, 311 U.S. 377. A utility seeking a right of way over public lands may be required to agree to carry government power over its lines. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17. And the grant to San Francisco of certain lands and rights of way over federal property, for use as a municipal water supply and for electrical production, could be conditioned on

[1] The "Perko cases" cited by petitioner, Pet. 10, 14, 18, deal with the unsuccessful efforts of resort owners to resist a ban on air travel in a primitive section of national forest, and raise no issues presented here.

the City's agreement not to transfer the right to sell electrical power produced under this grant to any private utility:

> The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. And the policy to govern disposal of rights to develop hydroelectric power in such public lands may, if Congress chooses, be one designed to avoid monopoly and to bring about a wide-spread distribution of benefits. The statutory requirement that Hetch-Hetchy power be publicly distributed does not represent an exercise of a general control over public policy in a State but instead only an exercise of the complete power which Congress has over particular property entrusted to it. [*United States* v. *San Francisco,* 310 U.S. 16, 29–30.]

The power of Congress over the public lands is delegable, *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 336–338; *United States* v. *Grimaud,* 220 U.S. 506, and the executive department to which the power is delegated, like Congress, may impose conditions on their use. *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U.S. 275, 295; *Southern Pac. Co.* v. *Olympian Co.,* 260 U.S. 205.

> The Government may dispense its bounty on such terms as it sees fit; and the executive agency which Congress has chosen for the purpose of giving away public lands and mineral deposits is peculiarly equipped, in terms of experience and administrative capacity, to act

> in its behalf. When an executive agency acts in this capacity, there is, perhaps, less reason than in any other type of administrative action to subject its determinations to judicial review. [*Ickes* v. *Underwood,* 141 F. 2d 546, 548 (C.A.D.C.), certiorari denied, 323 U.S. 713.]

With respect to the national forests, Congress has directed the Secretary of Agriculture to "make provisions for the protection against destruction by fire and depredations upon the public forests and national forests * * * to regulate their occupancy and use and to preserve the forests thereon from destruction." Organic Administration Act of June 4, 1897, 30 Stat. 35, as amended, 16 U.S.C. 551. In addition, the Secretary is "authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the national forests for electrical plants, poles, and lines for the generation and distribution of electrical power." Act of February 15, 1901, 31 Stat. 790, as amended, 16 U.S.C. 522. Statutory authority to impose absolute liability for fire suppression costs as a condition of permitting use of national forests for electrical power lines is thus plain.

The Secretary is directed to exercise discretion and judgment in adjusting policies calculated to achieve the purposes of these Acts. See *McMichael* v. *United States,* 355 F. 2d 283 (C.A. 9); *Forbes* v. *United States,* 125 F. 2d 404, 408–410 (C.A. 9). And to the Secretary's policy attaches a presumption of the existence of facts justifying the policy. *Thompson* v. *Consolidated Gas Co.,* 300 U.S. 55, 69. Regulations, such as those imposing absolute liability upon private utilities seeking to use national forests for electrical trans-

mission, cannot be invalidated unless plainly inconsistent with the law. *Boske* v. *Comingore,* 177 U.S. 459, 470. In view of the known facts about the danger of forest fires, the difficulties of proof, and the annual destruction which they effect upon forests, the Secretary's imposition of absolute liability here was justified. See *St. Louis and San Francisco R'y* v. *Mathews,* 165 U.S. 1; *Crowell* v. *Benson,* 285 U.S. 22, 41–42; *N.Y. Central R.R. Co.* v. *White,* 243 U.S. 188.

2. The separate classification of publicly-owned and privately-owned utilities does not violate due process. As the court of appeals stated, "Even under the equal protection clause the separate classification of privately and publicly owned utilities has long been held justifiable" (Pet. App. A 2–3). *St. Louis and San Francisco R'y* v. *Mathews, supra; Springfield Gas Co.* v. *Springfield,* 257 U.S. 66, 70–71; *Louisville Gas Co.* v. *Coleman,* 277 U.S. 32, 37; *Puget Sound Co.* v. *Seattle,* 291 U.S. 619.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1969.

[2] If required, a basis for the discrimination in this case appears from the fact that many if not all publicly-owned utilities would be unable to commit themselves to absolute liability (Pet. App. E).

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IN THE

Supreme Court of the United States

October Term, 1969
No. 556

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Reply Brief to Brief for the United States in Opposition to the Petition for Writ of Certiorari.

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IN THE

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Reply Brief to Brief for the United States in Opposition to the Petition for Writ of Certiorari.

By permission of the Court, pursuant to telegrams (copies of which are attached to this brief and marked Appendix "A"), petitioner Southern California Edison Company (hereinafter "Edison") points to certain incorrect statements and pertinent omissions in the brief for the United States (hereinafter "Government") as follows:

1. In the Government's brief (Page 2) it is stated that 16 U.S.C. §522, provided in pertinent part:

> "The Secretary of Agriculture is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the national forests for electrical plants, poles and lines for the generation and distribution of electrical power, * * *."

The pertinent part of the law which was *omitted* was that the general regulations permitted grants to "any [every] citizen, association or corporation of the United States." This omission shows in 16 *United States Code Annotated* 576.

2. On Page 3 of the Government's brief, it is stated that 16 U.S.C. § 523 provides in relevant part:

> "The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the national forests of the United States for electrical poles and lines for the transmission and distribution of electrical power * * *:"

However, the Government omitted that the general regulations applied to rights of way for electrical facilities to be granted "to any citizen, association or corporation of the United States . . ." The foregoing omitted portion is printed in 16 *United States Code Annotated* 577.

3. The Government omitted the dates of all cases cited and omitted a table of authorities cited. We understood that both the dates of the cases and such table should be included in all briefs. These, however, are *minutiae*. The important thing is the omission of the dates of the essential cases the Government relies upon. We exhibit a table showing such cases, the Government brief page where cited, and the year of decision.

Name and Citation of Case	Brief Page	Year Decided
So. Pac. Co. v. Olympian Co., 260 U.S. 205	6	1922
U.S. v. San Francisco, 310 U.S. 16	6	1940
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Springfield, etc. v. Springfield, 257 U.S. 66	8	1921
Puget Sound Co. v. Seattle, 291 U.S. 619	8	1934
St. Louis & S.F. R'y v. Mathews, 165 U.S. 1	8	1897
Crowell v. Benson, 285 U.S. 22	8	1932
N.Y. Cent. R.R. Co. v. White, 243 U.S. 188	8	1917
Louisville Gas Co. v. Coleman, 277 U.S. 32	8	1928

The citation of these old and frequently overruled or strongly criticized cases, as pointed out previously,

without date, must, we think, be taken as intentional and as having the purpose of distracting attention from the modern and controlling precedents.

The above table shows that no case essentially relied on by the Government was decided in the last 25 years, five of the nine are 40 years old, and one from the last century. We do not say that *Marbury v. Madison,* 1 Cr. 137, is not good law because it was decided in 1803, but we do say that, generally speaking, old cases on collateral issues which have been either overruled or distinctly limited ought to be neither persuasive nor convincing.

4. It hardly is correct to say that there is a presumption of the existence of facts justifying the secretary's policy in this case in light of the fact that, as previously pointed out, only a minute, hardly measurable percent of forest fires are caused by utility-generated or transmitted electricity.

> D. Ct. Cl. Tr. p. 121; 134 National Geographic Magazine (July 9, 1968) p. 127, quoting Malcolm Hardy, Director of the Cooperative Forest Fire Prevention Program of the United States Forest Service; Forest Service sponsored commercial, TV Channel 7, Los Angeles, August 4, 1968, cited and quoted in Appellant's Reply Brief, United States Court of Appeals (9th Cir.) p. 6.

5. The brief states on the authority of *Ivanhoe Irr. Dist. v. McCracken,* (1958) 357 U.S. 275, and *Southern Pac. Co. v. Olympian Co., supra,* that the executive department to which power is delegated, like Congress, may impose conditions on their [the public lands'] use. The *Ivanhoe* case was cited in our petition for certiorari (p. 13) and it holds that any discrimination in the use of federal lands can only be justified if it

is reasonable, *inter alia.* See particularly 357 U.S. at 295. This case would hardly seem to support the doctrine advanced by the Government that an executive department has the power to impose unconstitutional conditions by its rules or its contracts; yet, as we read the brief in opposition, that is exactly what the Government does say on Page 6. If the Government so says, the Government is wrong. The doctrine of unconstitutional conditions is extensively dealt with in our petition at pp. 14 and 15. The idea that the Government has any proprietary right in Government lands which gives it freedom from the Constitution in administering the same has been certainly set at rest.

Takahashi v. Fish, etc. Commission, (1948) 334 U.S. 410;

Purdy, et al. v. California, (1969) 71 Adv. Cal. Rep. 587.

6. The "Perko" cases, cited by Edison in its petition at pp. 10, 14 and 18, are said to raise no issue presented here. (Footnote 1, p. 5, Government Brief) This is incorrect. First, the *Perko* cases were said to be unexceptional in the Government's brief before the Circuit. (p. 22, pr. 7) Second, the *Perko* cases clearly hold that the Forest Service must administer the national forest fairly and without discrimination. These cases, six in number, were cited to this Honorable Court previously and the citations are in the table of authorities herein. They surely present one of the *very* issues presented here. Further, no mention is made in the Government's brief in opposition of *Jones v. Freeman,* (1968), 400 F. 2d 383, which we cited in our petition on p. 14, but the citation of which we omitted by error. This case held that (1) if the Secretary of Agriculture acted beyond the scope of his authority in promulgating an improper regulation, sovereign immunity is no defense; (2) *Perko v. U.S., supra,* was cited with approval; (3) that 16 U.S.C. § 551 authorized judicial review of such regula-

tions as the Secretary here made; (4) that something committed to agency *discretion* by law is not for that reason judicially unreviewable; and (5) since a new trial was granted and plaintiffs "will be entitled to a trial *de novo* if there is no administrative hearing, we need not consider whether failure to provide an administrative hearing is denial of due process." The fact that *Jones v. Freeman, supra,* is not even mentioned in the Government's brief is, we think, a concession, *sub silentio,* that its holdings are correct and it hardly supports the position of the Government here.

7. On Page 7 of the Government's brief it is stated at length that "under 16 U.S.C. § 551 and 16 U.S.C. § 522 the Secretary is authorized under general regulations to permit the use of the national forests for electrical plants, poles and lines for the generation and distribution of electric power and that statutory authority to impose absolute liability for fire supression costs as a condition of permitting the use of the national forests for electrical power lines is thus plain." Not only does the Government omit the pertinent portions of Section 522; namely, that the regulations are to be general and to govern any [every] citizen, association or corporation of the United States, but clearly there is nothing in Section 551, Section 522 or any other section which confers on the Secretary or any other Government official authority to impose absolute liability on one utility and liability based only on negligence on another.

One of the newest and most convincing practical anomalies that would result from the present decision and practice of the United States Forest Service is the question of what rule of law is to govern the 750,000 volt direct current transmission line (a part of the Pacific northwest-southwest intertie extending from the Oregon border to Sylmar, California, which crosses miles of public and national forest lands). This line, which is tentatively scheduled for operation in March 1970, will be jointly owned by a privately-owned public

utility (Edison, 50%), and the Department of Water and Power of the City of Los Angeles, and the Cities of Burbank, Glendale and Pasadena (together, 50%). The permit which the National Forest Service will issue for this line is to be issued in the joint names of the above joint owners as permittees and is for the purpose of transmitting energy available in the Pacific Northwest to Los Angeles at times of the year and at other times of the year for transmission from Los Angeles to the Pacific Northwest.

What rule should apply to this line? The Government says it cannot apply absolute liability to the Department of Water and Power and the Cities because they do not have the authority so to agree, but that it applies to Edison because the contract in regulation for absolute liability is legal, valid and Constitutional. In fact, the Government relies on this position as the very last words of its brief (p. 8, fn. 2), yet here again the United States Constitution (Article VI, Clause 2) which would seem to make the federal forest regulation requiring absolute liability derived from the cited federal statutes, if valid, the Supreme Law of the Land and thus would override the so-called inability of the publicly-owned utilities to commit themselves to absolute liability. This all if the Government's position was valid in the first place. Surely, this dilemma is inescapable, and the Government is "Hoist with his own petar." (William Shakespeare, Hamlet III, iv, 206.)

Respectfully submitted,

ROLLIN E. WOODBURY,
RANSOM W. CHASE,
RICHARD T. DRUKKER,
Counsel for Petitioner.

APPENDIX A.

WESTERN UNION

[Telegram]

CHARGE TO THE ACCOUNT OF
CHASE, ROTCHFORD, DRUKKER & BOGUST

NOVEMBER 13, 1969

HONORABLE JOHN F. DAVIS, CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

RE: SOUTHERN CALIFORNIA EDISON COMPANY VS. UNITED STATES OF AMERICA NUMBER 556

THERE ARE MISSTATEMENTS OF FACT, IN MY OPINION, AND PERTINENT OMISSIONS, IN MY OPINION, IN THE GOVERNMENT'S REPLY TO THE PETITION FOR THE WRIT OF CERTIORARI IN THE ABOVE REFERENCED MATTER, NUMBER 556 IN THE PRESENT TERM OF THE SUPREME COURT. WOULD YOU KINDLY ASK THE COURT IF IT WOULD BE IN ORDER FOR US TO FILE A TWO OR THREE PAGE AFFIDAVIT OF REPLY, IF THE REQUEST HAS NEITHER BEEN GRANTED OR DENIED WHEN YOU RECEIVE THIS TELEGRAM, AND WOULD YOU WIRE ME THE ANSWER OF THE COURT COLLECT.

RESPECTFULLY
ROLLIN E. WOODBURY,
RANSOM W. CHASE
AND RICHARD T. DRUKKER
BY RICHARD T. DRUKKER,
411 WEST FIFTH STREET
SUITE 910,
LOS ANGELES, CALIFORNIA 90013

CC: ROLLIN E. WOODBURY, ESQ.
RANSOM W. CHASE, ESQ.
ALL COUNSEL

WESTERN UNION

[Telegram]

(139).

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RICHARD T DRUKKER—
411 WEST FIFTH ST SUITE 910 LOSA—

FORTY PRINTED COPIES OF REPLY BRIEF SOUTHERN CALIFORNIA EDISON SHOULD REACH THIS OFFICE BY NOVEMBER 26th—

JOHN F DAVIS CLERK